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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-215

REDERI A/B SOYA, AS OWNER OF THE M/V ATLANTIC SONG and ATLANTIC CONTAINER LINE, LTD.,

Petitioners,

versus

EVERGREEN MARINE CORPORATION, S.A. and S.S. CENTRAL TRUST, her engines, boilers, etc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

At pages 2 and 3 of their petition, petitioners advance some seven (7) alleged questions presented to this Court. Respondents respectfully submit there is only one (1) issue, and that is whether the time charterer of the ATLANTIC SONG, ACL, is entitled to any recovery for loss of use of the vessel in addition to the owner of the ATLANTIC SONG, Soya, who has already been allowed a recovery in this matter.

STATEMENT OF THE CASE

The evidence in this case clearly indicates that the ATLANTIC SONG was owned by Rederi A/B Soya of Stockholm, Sweden, and time chartered to Atlantic Container

Line, Ltd. of Hamilton, Bermuda. See petitioners' appendix, page 11a. The time charter between the owner and the charterer of the ATLANTIC SONG is on a Baltic and International Maritime Conference Standard Uniform Time Charter. This arrangement is nothing more and nothing less than the ordinary time charter used thousands of times by shipowners who time charter their vessels throughout the world. In fact, at page 6 of their petition, petitioners admit that a standard charter form was used in the instant matter.

It is further apparent from the time charter that the time charterer of the ATLANTIC SONG was an entirely separate and distinct corporation from the owner and that the said time charterer had absolutely no ownership or proprietary interest in the ATLANTIC SONG. See petitioners' appendix, page 11a, where the District Court so found. Respondents have already agreed that the owner of the ATLANTIC SONG is entitled to recover for that vessel's loss of use at the rate of $3,860.00 per day, but nevertheless, the ATLANTIC SONG's time charterer, ACL, seeks to additionally recover for the vessel's loss of use over and above the owner thereof, which claim was disallowed by both the District Court and a unanimous Court of Appeals.

The charter hire rate of the ATLANTIC SONG, i.e., $3,860.00 per day, is alleged by petitioners to be both "fictitious" and "nominal." However, it should be pointed out that the rate of $3,860.00 per day, is nearly four (4) times the rate of charter hire per day for the CENTRAL TRUST.

Petitioners submit that the applicable time charter is not what it purports to be. However, the instrument, selected by the petitioners, speaks for itself, and is merely the ordinary time charter similar to those used by numerous shipowners. The District Court so found in its decision at petitioners' appendix, page 11a. Indeed, the ATLANTIC SONG's own witnesses admitted that ACL has no actual ownership interest in such vessel and that there is a separate time charter between ACL and the owners of other vessels under time charter. The language found in the pertinent charter party here involved is merely the usual standard time charter language, which is found in other time charters as well.

After reviewing the evidence surrounding the relationship between the owner and time charterer of the ATLANTIC SONG, and taking into consideration the decisions of this Court, the English decisions and other pertinent law here involved, both the District Court and the unanimous Court of Appeals concluded that the ATLANTIC SONG's time charterer could not recover for alleged loss of use of that vessel, in addition to the owner.

REASONS FOR DENYING THE PETITION

The decision of the District Court denying the claim of the time charterer is found in petitioners' appendix beginning at page 1a. The unanimous decision of the United States Court of Appeals for the Fourth Circuit is found at pages 25a and 26a of petitioners' appendix and not at pages 18a to 19a as erroneously stated at page 1 of petitioners' petition. In denying the claim of the time charterer, both the District Court and the Court of Appeals paid respect to this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint*, 48 S.Ct. 134, 275 U.S. 303 (1927). In that decision, this Court, speaking through Mr. Justice Holmes, unanimously denied a similar claim by the time charterer of a vessel. We know of no decisions since *Robins, supra*, that criticize or question the decision of this Court in that case and indeed the decision has been cited with approval on numerous occasions. In fact, in the recent case of *Kaiser Aluminum & Chemical Corp.* v. *Marshland Dredging Co.*, 455 F.2d 957 (1972), the Fifth Circuit denied a somewhat similar claim, and in doing so, cited with approval this Court's decision in *Robins, supra.*

It would appear that the petition of the ATLANTIC SONG is little more than just another example of a litigant who is unhappy with the decision of the District Court and the Court of Appeals as well. The case has no importance beyond the immediate parties involved, and indeed Soya and ACL readily agreed to the use of the time charter that they now assert is not, in actuality, a time charter at all, but something more. The case involves absolutely no conflict of Circuits and

indeed the Circuits are unanimously in accord with the earlier decision of this Court in *Robins, supra*. No constitutional issues are involved, no statute of the United States if involved, and indeed the public interest is in no way affected by this matter.

The District Court in this case specifically made a finding of fact that the ATLANTIC SONG was owned by Soya, and that it was time chartered to ACL. See petitioners' appendix, page 11a. All too clear is the charter party itself, which along with this finding forecloses any argument by ACL that the arrangement was otherwise. *McAllister* v. *USA*, 348 U.S. 19 (S.Ct. 1954). In this Court's decision in *Robins, supra*, a vessel had suffered an injury to its propeller as a result of the negligence of the drydock while certain work was being performed. After the drydock had settled the vessel owner's claim for loss of use, the time charterer brought suit for its own loss of use and both the District Court and the Court of Appeals allowed the time charterer to recover. This Court later reversed. The suit by the time charterer was brought both in contract and in tort. Mr. Justice Holmes, speaking for this Court, first discussed the claim asserted in contract by the time charterer and denied same. No contract exists in the instant case upon which the time charterer of the ATLANTIC SONG can even base a suit, and, therefore, any claim of the time charterer rests solely in tort, which type of action was also denied by this Court in its *Robins* decision. The following pertinent language is found at 48 S.Ct., page 135:

> "Of course the contract of the petitioner (Robins) with the owners imposed no immediate obligation upon the petitioner to third persons as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioners contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.

* * *

The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if someone else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents * * *." (Emphasis ours)

Thus this Court has laid to rest the argument made by the time charterer of the ATLANTIC SONG that it be allowed to recover loss of use in addition to the claim of the owner of the vessel. Obviously, no further authority need be cited to reject this claim, but others do exist, and should be called to the attention of this Court. Perhaps the most important case subsequent to *Robins, supra*, is the case of *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.*, 153 F.2d 869, 2d Cir. 1946 (certiorari denied, 66 S.Ct. 980, 328 U.S. 835). The *Agwilines* case involved a collision between two vessels, as a result of which a claim was asserted on behalf of the time charterer for loss of use of one of the vessels. At page 870, Judge Learned Hand for the Second Circuit, in rejecting the claim, makes the following pertinent statement:

"It is well settled law that damages for the detention of a commercial vessel are to be measured by the profits which *the owner* would have realized from her use, had she been free. Citing The Potomac, 105 U.S. 630, 26 L.Ed. 1194, The Conqueror, 166 U.S. 110, 133, 17 S.Ct. 510, 41 L.Ed. 937." (Emphasis ours)

In *Agwilines, supra*, Judge Hand discusses the time charterer's right to such a claim and rejects same in view of this Court's decision in *Robins*, as well as other reasons. He then goes on to discuss the rationale of the *Robins* case which refused to allow a recovery where no legal wrong had been committed against the time charterer and he also refers to the leading English case on the subject, *Chargeurs Reunis, etc.* v. *English and American Shipping Co.*, 9 Lloyds List L.R. 464, which held precisely the same as *Robins* on this question. Indeed it is significant that counsel for the ATLANTIC SONG

can point to absolutely no case subsequent to *Robins*, in support of his contention that a time charterer should be allowed to recover in addition to the owner. The only cases cited are *The Aquitania* 270 F. 239 (S.D.N.Y. 1920), *Hines* v. *Sangstad SS Co.*, 266 F. 502 (1st Cir. 1920), and *The Beaver*, 219 F. 139 (9th Cir. 1915). It should be pointed out that each of these decisions referred to by the ATLANTIC SONG was prior to this Court's decision in *Robins, supra.*

As Special Master, Wharton Poor, a noted authority on charter parties, so aptly stated, as quoted in the District Court opinion in the *Agwilines* case, 61 F.Supp. 191, at page 193:

> "* * *In so far as these decisions allow the time charterer to recover for negligent damage to his contract right, they are overruled by the *Robins* case."

The decision of Special Master Poor was ultimately upheld by not only the District Court at 61 F.Supp., page 198, but also affirmed by the Second Circuit in 153 F.2d 869, previously discussed. Subsequently, certiorari was denied in *Agwilines* by the Supreme Court, 66 S.Ct. 980, 328 U.S. 835.

We would further like to call this Court's attention to the opinion of Special Master Poor, 61 F.Supp. 191, where he discusses in detail the question of whether or not the law allows a time charterer to recover either in his own right for loss of use or whether another party can recover for him. He ultimately concludes that it is only an owner with a proprietary interest in a vessel who can recover for its loss of use. This is the law not only in the United States, but in the other major maritime nation of the world, Great Britain. See *Chargeurs Reunis, etc.* v. *English and American Shipping Co.*, 1921, 9 L.L.R. 90 (Admiralty Division), affirmed at 464 by Court of Appeals.

Several pertinent comments of Special Master Poor, as heretofore mentioned, a noted authority on charter parties, are called to the attention of this Court. In *Agwilines, supra*, 61 F. Supp. 191, at page 193, the following statement is found on the measure of damages in matters of this nature:

> "The measure of damages for detention when the ship is under a long term time charter is the hire which

the shipowner loses, to which should be added other incidental expenses (fuel, etc.) incurred. Citing case."

In quoting from the *Chargeurs* case, *supra*, in 61 F.Supp., at page 196 of the District Court opinion, Mr. Poor states as follows:

> "In those circumstances the French Government (time charterer) had no cause of action arising out of the negligence of the Merida. *That means this: that if there is to be any recovery at all it can only be a recovery by the owners.*" (Emphasis ours)

It is quite clear from reading the opinion of both Special Master Poor and the Court of Appeals in the *Agwilines* case that they feel this type of case is governed by *Robins, supra* and the English decision in the *Chargeurs Reunis, supra*. Here we find both of the world's leading maritime nations in accord on the point in issue and each disallows a claim by the time charterer of a vessel.

ATLANTIC SONG also again advances certain alleged "distinctions" between the instant case and *Robins* much as it did in both the District Court and in the Court of Appeals. Briefly, let us take a look at these alleged "distinctions" for what they may be worth. At page 17 of its petition, the ATLANTIC SONG advises that Soya and ACL are not separate entities, but are intimately related and their individual interests cannot be separately considered. However, when analyzed, this is not true as the owner of the ATLANTIC SONG is a Swedish corporation and the time charterer is a Bermuda corporation which rents the vessel at a specified yearly rate. The time charter, which sets forth the agreement between the parties, is of basic design and specifies the rights and obligations of the two parties involved. Indeed this time charter differs little from the type found in both the *Robins* and *Agwilines* cases, where similar attempts by a time charterer to recover for loss of use were denied.

The ATLANTIC SONG also argues that *Robins* was decided in 1927 when allegedly the maritime business was not

quite so complex. However, the Uniform Baltic Exchange Time Charter in use in the instant case is a standard form time charter used by shipowners throughout the world today, as well as at the time of the *Robins* decision. Suffice it to say that neither this Court nor the English Courts have ever seen fit to modify or overrule their decisions on this issue and indeed a time charter is today still a time charter.

The next alleged "distinction" advanced by the ATLANTIC SONG in the instant case is that the six (6) owners making up Atlantic Container Line, Ltd., have had an interest in all ten (10) of the vessels chartered by ACL, the time charterer. This is not so because each vessel was separately owned by its registered owner and a separate standard time charter was in effect for each vessel.

Another alleged "distinction" is that the cause of action here by the time charterer is in tort and not in contract. However, this Court specifically laid to rest any distinction between an action in contract and one in tort. See 48 S.Ct., page 135 in *Robins*, where this Court said:

> "* * **The respondents have no claim either in contract or in tort*, and they cannot get a standing by the suggestion that if someone else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.* * *" (Emphasis ours)

The last alleged "distinction" is that the ATLANTIC SONG was on hire when the tort was committed. This final "distinction" is also laid to rest by the language of the Second Circuit in *Flint* v. *Robins Dry Dock & Repair Co.*, 13 F.2d 3 (2d Cir. 1926), later to be reversed by this Court as heretofore mentioned. While nevertheless allowing the time charterer to recover, the Second Circuit, at page 5 of its opinion, made this pertinent statement:

> "* * *That the damaged ship in those cases was in the active service of the charterer, while in the instant case it was off hire at the time of the injury furnishes no basis for distinguishing the cases.* * *"

Furthermore, in *Robins*, this Court made no distinction whatsoever between a vessel being either on hire or off hire at the time of the tort.

The ATLANTIC SONG argues that *Robins* was not a collision case as is the instant matter. While *Robins* is obviously controlling, regardless of whether or not it was a collision case, nevertheless this argument is refuted by the fact that *Agwilines* v. *Eagle Oil & Shipping Co., supra*, was a collision case, was decided subsequent to *Robins* and the Court in *Agwilines* held that *Robins* was directly applicable, with certiorari being ultimately denied by this Court. See also *Chargeurs Reunis, etc., supra*, which also was a collision case.

No authority needs to be cited, as indeed it is established law, to show that as a general rule, at the least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. See *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U.S. 1, 14 S.Ct. 240; *National Savings Bank of District of Columbia* v. *Ward*, 100 U.S. 195, 25 L.Ed. 621; *Henderson* v. *Arundel Corporation*, 262 F.Supp. 152, (1966 D.Md.), (affirmed 4CCA, 384 F.2d 998), and *Kaiser Aluminum & Chemical Corp.* v. *Marshland Dredging Company*, 455 F.2d 957, (1972 5CCA).

Another misapprehension alluded to in the ATLANTIC SONG's petition is the argument that merely because an ACL symbol was painted on the side of that vessel, a vessel such as the CENTRAL TRUST should have automatically concluded that ACL owned the ATLANTIC SONG. To the uninitiated, an ACL symbol would mean nothing, and to even contend that a vessel colliding with the ATLANTIC SONG at night could see this symbol and would assume the vessel was owned by Atlantic Container Lines, is straining at a gnat. In fact, such a contention was not even seriously argued in the District Court as can be found at page 11a of petitioners' appendix whereat the District Court succinctly states that there is no contention that the respondents had any knowledge of the time charter agreement, or that the injury was other than accidental.

The ATLANTIC SONG also goes on to argue that certain equitable considerations dictate that ACL should be allowed a recovery in addition to the owner. However, as can be seen from the following language of Special Master Wharton Poor in *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.*, 61 F.Supp. 191, at page 197, such matters not, even assuming their existence, which is denied. Special Master Poor put the matter succinctly:

> "This charter party cannot be turned, at the option of the libelant and the United States, into something which it is not. Nor do so-called 'equitable' considerations increase the damages which libelant recovers. The law in this class of cases is correctly ruled by the Supreme Court in the Robins case and by the English Court of Appeals in the Chargeurs Reunis case, and no greater measure of damages could be awarded libelant on some theory that a larger award would be more equitable."

In point of fact, the equities dictate against the allowance of any recovery by the time charterer who has no ownership or proprietary interest in a vessel, for to do so, would be a form of double recovery, which the law does not allow. Cargo is allowed to recover in these matters since they own and possess the proprietary interest in their goods or merchandise, but not so a time charterer who merely rents space on a vessel. See *Wyche* v. *Oldendorff*, 284 F.Supp. 575, (E.D. Va. 1967), and the cases referred to therein. Thus where the law refuses to impose the obligations of an owner upon a time charterer, a time charterer cannot be heard to say he has the necessary interest in a vessel to allow him to recover for a vessel's loss of use. We feel safe in saying that if the CENTRAL TRUST had initiated suit solely against the time charterer of the ATLANTIC SONG, we would have been met with the argument that the time charterer owed no legal responsibilities to another vessel such as the CENTRAL TRUST.

Finally, we wish to say in summation that this Court and the English Courts are in complete accord on the question raised. This country and Great Britain have both seen fit to deny an attempt by a time charterer to recover in addition to a

vessel's owner for loss of use. This pronouncement is the law today, and whether the reasons that underlie be remoteness, foreseeability, double recovery, multiplicity of actions, or what, it is both equitable and correct. Any decision to the contrary could lead to a multitude of suits by parties or individuals with some remote interest in the schedule of a vessel, which should be avoided. This Court has drawn the line in matters such as this, and the ATLANTIC SONG's efforts to show some distinction between the instant case and this Court's decision in *Robins*, do not accomplish their purpose, and in addition, no worthwhile reasons are advanced for overruling this Court's prior decision in *Robins*. It is, therefore, respectfully submitted that the District Court was entirely correct on both the facts of the instant case and the applicable law in denying recovery to the time charterer, ACL, and the United States Court of Appeals for the Fourth Circuit was clearly correct in affirming this decision.

CONCLUSION

It is respectfully submitted that there was no error on the part of the District Court in denying a recovery for the time charterer, ACL, nor was there any error on the part of the Fourth Circuit Court of Appeals in affirming the District Court's decision. Moreover, petitioners have failed to show that the decisions below in any way conflict with any decision of this Honorable Court, of any Circuit Court, or any applicable Court, or otherwise. The petition for the writ of certiorari should be denied.

Respectfully submitted,

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